ARAB MALAYSIAN FINANCE BHD

v.

SERAJUDIN MOHD ISMAIL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-680-1997]
2 APRIL 1998

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1*

CIVIL PROCEDURE: *Originating summons - Filed after affidavit-in-support - Whether should be dismissed*

This was a case for recovery of an outstanding loan that was secured by way of a third party charge on the defendant's property. The plaintiff filed an originating summons ('OS') to foreclose the defendants' property and sell the property by way of public auction.

However, the issue here was whether the OS was rendered inadmissible as the affidavit-in-support ('the affidavit') was affirmed a week before the filing of the OS.

Held:

[1] By virtue of O. 41 r. 1 of the Rules of the High Court 1980, an affidavit in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly intituled, the case number relating to that cause or matter is a vital factor that must be present. Before a case number is given to that particular cause or matter, the number of, and other details relating to the cause or matter are entered in a cause book as defined in O. 1 r. 4 of the Rules of the High Court 1980.

[1a] As the affidavit was affirmed in a cause or matter one week before the OS was filed, the affidavit could not be said to have been affirmed in a cause or matter because there was no cause or matter that had been registered at the Registry of the High Court.

[1b] As the affidavit formed the evidence on which the application was based, and was not affirmed in an existing cause or matter, then the filing of the same was an irregularity that could not be cured. It was a nullity that supported a non-existent cause or matter.

[2] There is no requirement that an affidavit should be filed at the same time as the OS. So long as the OS is filed, the plaintiff can file the affidavit-in-support not less than four days before the first hearing and serve the copy of the same on each defendant.

[3] The case of *Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd* was distinguished as the party objecting therein could not show that the one day earlier filing of the affidavit before the writ was improper. In this instance, it was not one day but one week and the impropriety had been considered.

[OS dismissed with costs.]

Case(s) referred to:

H Stacey v. Diamond Metal Products Co, Ltd & Anor [1935] MLJ 248 ***(refd)***

Kewangan Bersatu Berhad v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***

Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd [1988] 2 MLJ 308 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 4, O. 2 r. 1, O. 28, O. 28 r. 3(3), (4), O. 35 r. 1(2), O. 41 rr. 1, 4, O. 83 r. 2, (2)

For the plaintiff - KC Chow; M/s Nik Hussain & Partners
For the defendants - M Vickneswary; M/s V Manickam & Partners

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The plaintiff loaned a sum of RM500,000 to one Danar Engineering Sdn Bhd (the borrower). The said loan was secured by a third party charge on the defendants' property known as H.S.(D)5114 Lot No. 29696, Mukim of Kuala Lumpur (the property). The borrower defaulted in the repayment of the said loan and the plaintiff filed this originating summons (OS) to foreclose the said property and to sell the same by way of a public auction to recover the outstanding loan. The sum outstanding as at 13 January 1998 is RM605,551.95.

Court's Findings

The defendants argued that since the OS is dated 28 August 1997 and the affidavit in support affirmed by one Seow Swee Eng (encl. 2) is dated 21 August 1997, the affidavit being affirmed earlier to the filing of the OS, must be rendered inadmissible. The defendants relied on *H Stacey v. Diamond Metal Products Co, Ltd & Anor* [1935] MLJ 248. In that case Terrell J said at p. 250:

> ... The argument however that no affidavit can be sworn in an action which has not yet been commenced is on a different footing. This is more than an irregularity and makes the affidavit *qua* affidavit, entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not even been sworn, have been used on interlocutory application, on counsel's undertaking that the affidavit shall be resworn, or sworn and filed as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the Court acts on the assumption that counsel's undertaking will be honoured, and when that has been done the requirements of the Court's practice have been fully complied with. Apart from such cases affidavits to be used in court proceedings can only be sworn and filed in proceedings that are actually pending.

In reply the plaintiff relied on *Kewangan Bersatu Berhad v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79. In that case too, objection was taken that the affidavit supporting the originating summons was affirmed earlier than the date of the originating summons. In fact the affidavit was affirmed on 17 May 1994 whereas the originating summons was dated 30 May 1994, there being a difference of 13 days between the affirmation of the affidavit and the dating (or filing) of the originating summons. The learned judge held that in the absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit is in order and that there is also no requirement for the affidavit to be affirmed at the same time that the originating summons is filed. The learned judge went on to hold that O. 83 r. 2(2) of the Rules of the High Court 1980 (the RHC) which is applicable to charge actions, as in that case, in the same way that O. 28 r. 3(3) of the RHC is applicable to originating summonses generally, only requires the plaintiff to serve a copy of the affidavit in support of its application on the defendant not less than four clear days before the hearing of the originating summons.

With respect, I am of the view that specific attention ought to be given to O. 41 r. 1 of the RHC which reads:

> (1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.
>
> (3) ...

In other words an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is a vital factor that must be present; and before a case number is given to that particular cause or matter it must comply with O. 1 r. 4 of the RHC which defines a 'cause book' as a book kept in the Registry in which the number of, and other details relating to, a cause or matter are entered. Therefore where as in this case an affidavit has been affirmed exactly one week before the OS was filed, surely the said affidavit cannot be said to have been affirmed in a cause or matter because properly speaking there was no cause or matter that had been registered at the Registry. Whilst I agree that in so far as interlocutory or *ex parte* applications are concerned, the courts have accepted the affidavit affirmed prior to the filing of the application on the express undertaking of counsel to reswear the said affidavit, but in the present case where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view it is a nullity as it supports a non-existent cause or matter. In other words, the affidavit is 'still-born' and no resuscitative procedure by way of O. 2 r. 1 of the RHC which relates to the liberal stand taken by the courts in respect of non-compliance of the rules, can breathe life into the 'still born'. It remains a nullity. In the circumstances, even O. 41 r. 4 of the RHC which reads:

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

cannot save the day for the plaintiff.

To my mind, there is no requirement that the affidavit should be filed at the same time as the OS. O. 83 r. 2 of the RHC which deals with charge actions reads:

2 Claims for possession: Non-appearance by a defendant (O. 83 r. 2)

(1) Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, any defendant fails to enter an appearance, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.

This rule shall not be taken as affecting Order 28, rule 3, or rule 5(2), in so far as it requires any document to be served on, or notice given to, a defendant who has entered an appearance in the action.

(2) Not less than 4 clear days before the day fixed for the first hearing of the originating summons the plaintiff must serve on the defendant a copy of the notice of appointment for the hearing and a copy of the affidavit in support of the summons.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

Order 28 which deals generally with all the originating summons proceedings states in r. 3:

3 Notice of first hearing, etc (O. 28 r. 3)

(1) Not less than 4 clear days before the day fixed under rule 2 for the attendance of the parties before the Court for the hearing of an originating summons to which appearance is required to be entered, the party on whose application the day was fixed must serve a copy of the notice fixing it on every other party who has entered an appearance and, if the first-mentioned party is a defendant, on the plaintiff.

(2) Not less than 4 clear days before the day fixed under rule 2 for the hearing of an originating summons to which appearance is not required, the plaintiff must serve the summons on every defendant.

(3) Where the plaintiff intends to adduce evidence in support of an originating summons at the first hearing thereof he must do so by affidavit and, not

> less than 4 clear days before the hearing, serve a copy thereof on every defendant who has entered an appearance or, if the summons is one to which appearance is not required, on every defendant who has been served with the summons.

In other words, it is my judgment that so long as the OS is filed the plaintiff can file the affidavit in support not less than four clear days before the first hearing thereof and serve a copy of same on every defendant. There is therefore no requirement for the affidavit to be filed at the same time. I am fortified in this approach when I consider O. 28 r. 3(4) which reads:

> (4) Not less than 4 clear days before the day fixed for the hearing of an *ex parte* originating summons the applicant must file an affidavit in support of the summons.

This shows that the affidavit can be **filed** (emphasis added) not less than four clear days before the hearing of the *ex parte* OS. Clearly therefore a party can file the affidavit after the OS but surely it would be tantamount to putting the proverbial cart before the horse if the affidavit is allowed to be affirmed and filed in such cases as the one presently before me, before the OS is filed.

The plaintiff referred me to *Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd* [1988] 2 MLJ 308. There the learned judge in considering *Stacey's* case *(supra)* held that Tarrell J was dealing with a situation where an affidavit of one Hunter endorsed upon a letter written by him, was dated 12 July 1934 while the writ to the action that was going for trial was dated 10 August 1934, a difference of a little under one month. As Hunter had already died by the time the writ was issued, the question was whether his affidavit could be accepted as evidence under O. 35 r. 1(2) which provides that an order could be made that 'any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or the judge thinks reasonable'. The learned judge in *Lau Yeok Lin* held that the element of the death of Hunter was of primary consideration and therefore the question of non-availability of witnesses became the subject for substantial discussion. Further since the affidavit was filed just one day before the writ of attachment the learned judge held that that did not affect its validity unless the party objecting could show to his Lordship's satisfaction that that one day of earlier filing was improper. Since counsel was unable to show any impropriety, his Lordship accepted the affidavit. The case before me is quite different. It is not one day but one week and the impropriety has been considered. In my view the case of *Lau Yeok Lin* can be distinguished. In all the circumstances, I regard the affidavit filed as a nullity and its effect incurable. The OS stands unsupported and thus must be dismissed.

Having taken this stand there is in my view, no need for me to consider the other issue raised by the defence, that is, that the sum claimed in Form 16D was wrong.

I therefore dismiss the OS with costs.